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No. 09-1113

Court U.S.
APR 15 2010
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IN THE

Supreme Court of the United States

JEFFREY W. BADER,

Petitioner,

—v.—

LLOYD BLANKFEIN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI*

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April 15, 2010

QUESTION PRESENTED

Whether this Court should review the Second Circuit's determination that, as a matter of pure Delaware law, pre-suit demand was required in a shareholder derivative action alleging deficiencies in a 2007 proxy statement's disclosures concerning the valuation of employee stock options awards, where (i) the claims are moot because the directors' annual terms expired long ago, the relevant proxy rules have been amended, and shareholders were provided disclosure as to petitioner's valuation theory before voting in the uncontested election, (ii) the Second Circuit properly concluded that pre-suit demand was not excused given the majority of independent, outside directors on the Goldman Sachs board and the latitude provided in the then-applicable proxy-disclosure rules for the board to exercise its business judgment in selecting and applying an option-valuation model, and (iii) there were other grounds not reached by the district court or Second Circuit for dismissal?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, The Goldman Sachs Group, Inc. states that it is a publicly-held company, which has no parent corporation and that no publicly-held company owns 10% or more of its stock.

TABLE OF CONTENTS

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

COUNTER-STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

REASONS FOR DENYING THE WRIT 4

I. The Petition Should Be Denied Because This Action Is Moot. 4

II. The Second Circuit Did Not Err in Holding That Pre-Suit Demand Was Required and in No Way "Nullified" Delaware Law. 6

A. The Second Circuit Correctly Held That Pre-Suit Demand Was Required in This Case. 6

B. The Second Circuit Did Not "Nullify" Delaware Law. 10

III. Dismissal of This Action Is Warranted on Numerous Other Independent Grounds Not Reached By the Courts Below 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

Aronson v. *Lewis*,
473 A.2d 805 (Del. 1984), ... 7-8, 11

Avnet, Inc. v. *Scope Industries*,
499 F. Supp. 1121 (S.D.N.Y. 1980) 5

Church of Scientology of California v. *United States*,
506 U.S. 9 (1992) 4

City of Erie v. *Pap's A.M.*,
529 U.S. 277 (2000) 5-6

Cohen v. *Calloway*,
667 N.Y.S.2d 249 (N.Y. App. Div. 1998) 2

Haring v. *Prosise*,
462 U.S. 306 (1983) 10, 12

In re 3COM Corp. Shareholders Litigation,
C.A. No. 16721, 1999 WL 1009210
(Del. Ch. Oct. 25, 1999) 2

In re Anderson, Clayton Shareholders' Litigation,
519 A.2d 669 (Del. Ch. 1986) 8-9

In re CNET Networks, Inc.,
483 F. Supp. 2d 947 (N.D. Cal. 2007) 10

In re Computer Sciences Corp. Derivative Litigation,
No. CV 06-05288 MRP, 2007 WL 1321715
(C.D. Cal. Mar. 26, 2007) 10

Page(s)

In re Mobile Communications Corp. Consolidated Litigation,
C.A. No. 10627, 1989 WL 997182
(Del. Ch. Apr. 3, 1989) 9

In re Tri-Star Pictures, Inc., Litigation,
C.A. No. 9477, 1990 WL 82734
(Del. Ch. June 14, 1990) 9

Leavitt v. *Jane L.*,
518 U.S. 137 (1996) (per curiam) 10, 11-12

Lewis v. *Leaseway Transportation Corp.*,
C.A. No. 8720, 1990 WL 67383
(Del. Ch. May 16, 1990) 9

Pierson v. *Ray*,
386 U.S. 547 (1967) 10

Resnik v. *Swartz*,
No. 00 Civ. 5355 (LMM), 2001 WL 15671
(S.D.N.Y. Jan. 8, 2001),
aff'd, 303 F.3d 147 (2d Cir. 2002) 2

Risberg ex rel. Aspen Technology, Inc. v. *McArdle*,
529 F. Supp. 2d 213 (D. Mass. 2008) 10

Seinfeld v. Bartz,
No. C01-2259 TEH, 2002 WL 243597 (N.D. Cal. Feb. 8, 2002),
aff'd, 322 F.3d 693 (9th Cir. 2003) 2

Seinfeld v. *Becherer*,
No. 03-5225, slip op. (D.N.J. Jan. 27, 2005),
aff'd, 461 F.3d 365 (3d Cir. 2006) 2

Page(s)

Shaev v. *Hampel*, No. 99 Civ. 10578 (RMB), 2002 WL 31413805 (S.D.N.Y. Oct. 25, 2002), *aff'd*, 74 F. App'x 154 (2d Cir. 2003) 2

Siegman v. *Tri-Star Pictures, Inc.*, C.A. No. 9477, 1989 WL 48746 (Del. Ch. May 5, 1989) 9

St. Clair Shores General Employees Retirement System v. *Eibeler*, No. 06 Civ. 688 (SWK), 2006 WL 2849783 (S.D.N.Y. Oct. 4, 2006) 10

Telenor East Invest AS v. *Eco Telecom Ltd.*, No. 05 Civ. 7584 (GEL), 2005 WL 2239999 (S.D.N.Y. Sept. 7, 2005) 5

Vides v. *Amelio*, 265 F. Supp. 2d 273 (S.D.N.Y. 2003) 10

STATUTES, RULES AND REGULATIONS

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 12

Federal Rule of Civil Procedure 9(b) 12

Supreme Court Rule 10 7

Second Circuit Local Rule 32.1.1 11

Delaware Chancery Rule 23.1 8

17 C.F.R. § 229.402 ..... 1, 5

17 C.F.R. § 240.14a-101 1

COUNTER-STATEMENT OF THE CASE

Goldman Sachs is a Delaware corporation whose shares are listed on the New York Stock Exchange. This shareholder derivative action challenges the firm's 2007 Proxy Statement filed on Schedule 14A with the U.S. Securities and Exchange Commission ("SEC") on February 21, 2007 in connection with the firm's annual meeting and uncontested election of directors for a one-year term. In particular, the 2007 Proxy Statement disclosed the "Grant Date Present Value" of options granted by Goldman Sachs during its 2006 fiscal year to its Chief Executive Officer and certain other senior executives, and the methodology behind that valuation. Then-applicable SEC regulations required disclosure of certain information regarding executive and director compensation for the previous fiscal year whenever shareholders were asked to vote on the election of board members. (*See* Pet. App. 3a (17 C.F.R. § 240.14a-101, Item 8 (citing Item 402 of Regulation S-K, 17 C.F.R. § 229.402)). The directors were elected by an overwhelming margin, and their one-year term expired in the Spring of 2008.

Petitioner Jeffrey W. Bader filed this shareholder derivative action, alleging (among other things) that the options valuations set forth in the 2007 Proxy Statement were incorrect. At bottom, this action is based on petitioner's counsel's pet theory regarding options-valuation disclosure, variations of which petitioner's counsel has asserted in actions filed in courts across the Nation against well-known corporations for more than a decade. None of these actions, as far as we are aware, have

survived a motion to dismiss.[1] Petitioner's complaint does not seek to recover damages, but seeks injunctive and equitable relief, including an injunction against the 2007 shareholder meeting (held on March 27, 2007), voiding the elections of directors elected at that annual meeting (whose terms expired on April 10, 2008), and an equitable accounting.

Petitioner concededly did not make the demand on Goldman Sachs' Board of Directors that is a prerequisite to maintaining a shareholder derivative action under Delaware law. Rather, petitioner argued that pre-suit demand was excused because, *inter alia*, proxy-disclosure claims are exempt from the pre-suit demand requirement.

Respondents moved to dismiss the complaint based on numerous legal defects, including the failure to make the required demand on Goldman Sachs' Board, mootness and failure to state a claim. The District Court dismissed the complaint in an unpublished decision, holding that petitioner failed

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[1] *See Seinfeld* v *Becherer*, No. 03-5225, slip op. (D.N.J. Jan 27, 2005), *aff'd*, 461 F 3d 365 (3d Cir. 2006) (Honeywell Int'l); *Seinfeld* v. *Bartz*, No. C01-2259 TEH, 2002 WL 243597 (N.D. Cal. Feb. 8, 2002), *aff'd*, 322 F.3d 693 (9th Cir. 2003) (Cisco Systems); *Shaev* v. *Hampel*, No. 99 Civ. 10578 (RMB), 2002 WL 31413805 (S.D.N Y. Oct. 25, 2002), *aff'd*, 74 F. App'x 154 (2d Cir. 2003) (Alcoa); *Resnik* v. *Swartz*, No. 00 Civ. 5355 (LMM), 2001 WL 15671 (S.D.N.Y. Jan. 8, 2001), *aff'd*, 303 F.3d 147 (2d Cir. 2002) (Symbol Technologies); *In re 3COM Corp. S'holders Litig.*, C.A. No. 16721, 1999 WL 1009210 (Del. Ch. Oct. 25, 1999); *Cohen* v. *Calloway*, 667 N.Y.S.2d 249 (N.Y. App. Div. 1998) (General Electric).

adequately to plead that his failure to make pre-suit demand on the Goldman Sachs Board was excused under Delaware law and rejecting petitioner's contention that derivative claims challenging proxy disclosures are exempt from the usual pre-suit demand requirement.

The Second Circuit affirmed the dismissal by summary order, holding that "[t]he particular disclosure at issue . . . was a business judgment," and therefore subject to the demand requirement, because "[t]he information required to be disclosed could not have been done automatically or without thought. Rather, determining which figure to disclose and which pricing model to apply required discretion and an exercise of business judgment." (Pet. App. 5a.) Accordingly, the Court held that pre-suit demand was required and the complaint was dismissed for petitioner's failure to make such demand.

SUMMARY OF ARGUMENT

The Petition should be summarily denied. As a threshold matter, this case has long been moot. In all events, the Second Circuit's nonprecedential summary order correctly applied the established demand futility standard under Delaware law to a particular proxy disclosure made pursuant to a now-superseded regulation and correctly held that demand was required, a result which in no way nullified Delaware law and does not justify departure from this Court's well-settled practice of not reviewing state-law determinations of the federal courts of appeals.

REASONS FOR DENYING THE WRIT

I. The Petition Should Be Denied Because This Action Is Moot.

As an initial matter, the Petition should be denied because the claims at issue are moot. This action does not seek to recover damages and concerns application of a now-superseded regulation to a three-year-old proxy statement, issued in connection with the uncontested 2007 election of directors for an annual term (among other matters), where voting shareholders were provided disclosure of petitioner's valuation theory. *See Church of Scientology of Cal.* v. *United States*, 506 U.S. 9, 12 (1992) ("It has long been settled that a federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." (internal quotation marks omitted)).

Subsequent to the filing of this action, several developments have occurred that render it impossible for petitioner to obtain the relief he seeks. Petitioner's complaint requests (i) an injunction against Goldman Sachs' 2007 annual meeting; (ii) equitable relief against defendants from hereafter engaging in the practices as particularized in the complaint; (iii) voiding the elections of directors for 2007; and (iv) an equitable accounting. The 2007 annual meeting occurred on March 27, 2007, and the one-year terms of the directors elected at that annual meeting—the election petitioner seeks to void—expired when new directors were elected on April 10, 2008 (indeed, yet another election of directors

occurred on May 8, 2009). Further, "the particular SEC regulation at issue in [petitioner's] claims is no longer in effect."[2] (Pet. App. 3a.) As a consequence of these developments, the relief sought in this action cannot be granted and the action is accordingly moot.[3] *See City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 287 (2000) (case is moot where it becomes impossible for the court to grant any effectual relief to the prevailing party). The Petition should be denied on this basis alone.[4]

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[2] Relevant excerpts of then-current 17 C.F.R § 229.402 are set forth at Pet. App. 32a-34a. Specifically, as the Second Circuit's decision recognized, 17 C.F.R. § 229.402 permitted disclosure of either "the potential realizable value of stock options granted . . *or* the present value of the stock options granted." (Pet. App 5a; *see also* Pet. App. 33a.) If the present value was disclosed, "it could be calculated under '*any* option pricing model.'" (Pet App. 5a (quoting 17 C.F.R. § 229.402(c)(2)(vi) (emphasis supplied)); *see* Pet. App. 33a.) This regulation has since been amended to require the disclosure of present value. (*See* Pet 3; Pet App. 3a.)

[3] In addition, the existence of this action and a description of petitioner's claims were fully disclosed to Goldman Sachs shareholders in a supplemental proxy statement sent prior to the 2007 annual meeting, thus enabling them to consider petitioner's theory for themselves and further mooting his claims *See Telenor E. Invest AS* v. *Eco Telecom Ltd.*, No. 05 Civ. 7584 (GEL), 2005 WL 2239999, at *3 (S.D.N.Y. Sept 7, 2005) (disclosure to shareholders of the disputed facts is remedy for disagreement regarding valuation); *Avnet, Inc.* v *Scope Indus.*, 499 F Supp. 1121, 1125 (S.D.N.Y. 1980) (same).

[4] The Second Circuit concluded that this action was not moot on the basis that the "underlying alleged wrongful conduct" was capable of repetition, yet would evade review if the action were deemed moot. (Pet. App. 3a.) However, because the governing regulation has been superseded, the alleged

II. The Second Circuit Did Not Err in Holding That Pre-Suit Demand Was Required and in No Way "Nullified" Delaware Law.

A. The Second Circuit Correctly Held That Pre-Suit Demand Was Required in This Case.

The Second Circuit correctly determined that this action was governed by the well-established requirement under Delaware law that pre-suit demand be made as a prerequisite to bringing a derivative action unless the plaintiff can plead with particularity sufficient grounds to excuse demand under Delaware law. (*See* Pet. App. 4a (citing *Aronson* v. *Lewis*, 473 A.2d 805 (Del. 1984), *overruled on other grounds by Brehm* v. *Eisner*, 746 A.2d 244 (Del. 2000)).) The Second Circuit then properly analyzed whether pre-suit demand was required under the *Aronson* test. (*See* Pet. App. 5a.) The Petition does not argue that the court below erred in apprehending that Delaware's pre-suit demand

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violation of that regulation is not "capable of repetition." Moreover, even reading the complaint more broadly as alleging "misleading calculations in proxy statements under section 14" (Pet. App 3a), petitioner's claims are not "evading review," as he has filed two subsequent lawsuits based on the same theory and challenging options-valuation disclosures in Goldman Sachs proxy statements under the now-current regulation. Both actions are currently pending before the District Court. *See Bader* v. *The Goldman Sachs Group, Inc.*, No. 08 Civ. 255 (SLT) (E.D.N Y.) (2d Am. Compl. filed March 24, 2010); *Bader* v. *Winkelried*, No. 09 Civ. 2607 (SLT) (E.D.N.Y.) (filed Mar. 24, 2009).

requirement governs this action, or in setting forth the substantive elements of the *Aronson* analysis. The Petition, accordingly, at most challenges the Second Circuit's application of those standards, which alone counsels denial of the writ. *See* Sup. Ct. R. 10 (writ of *certiorari* "rarely granted when the asserted error consists of . . . misapplication of a properly stated rule of law").

Petitioner contends that the demand requirement does not apply here because the challenged stock option valuations should have been mechanical and entailed no exercise of business judgment. The Second Circuit, however, recognized that the proxy regulation permitted disclosure of "*either* the potential realizable value of stock options granted to officers *or* the present value of the stock options granted," and that, if the latter course were chosen, the present value could be calculated under "*any* option pricing model." As a result, the Court properly concluded that "discretion and an exercise of business judgment" were required in making the requisite disclosure. (Pet. App. 5a (internal quotation marks omitted).) This reasoning accords with Delaware law.

The Petition does not explain why a bare allegation of a disclosure violation sets forth facts "so egregious on [their] face that board approval [could not] meet the test of business judgment." *Aronson*, 473 A.2d at 815. At its core, petitioner's argument would automatically excuse demand in every case concerning alleged proxy misstatements. Such a result would, as *Aronson* reasoned in an analogous context, render the demand requirement

"meaningless" and "leav[e] the clear mandate of [Delaware] Chancery Rule 23.1 devoid of its purpose and substance." *Id.* at 814. To the contrary, as the Second Circuit recognized, under *Aronson*, the demand inquiry is necessarily fact specific. (*See* Pet. App. 4a.) *See also Aronson*, 473 A.2d at 814-15 ("entire [demand] review" is "factual in nature," whereby "the alleged wrong is substantively reviewed against the factual background alleged in the complaint"). Thus, the Second Circuit concluded that "[t]he particular disclosure at issue on this appeal was a business judgment," but that the Court could "anticipate a situation in which demand would be futile, and thus excused under the second prong of *Aronson*, in a section 14 derivative suit." (Pet. App. 5a.)

The cases discussed in the Petition do not support the argument that pre-suit demand is always excused in disclosure cases. Petitioner describes *In re Anderson, Clayton Shareholders' Litigation*, 519 A.2d 669 (Del. Ch. 1986), as the "leading case" addressing whether the business judgment rule applies to proxy-disclosure claims. (Pet. 5.) *Anderson* did not, however, address the derivative pre-suit demand requirement at issue here at all. *Anderson* was not a derivative suit but, rather, involved shareholders' direct claims. *Id.* at 671. Accordingly, *Anderson* did not discuss or decide the issue addressed by the Second Circuit: whether pre-suit demand is required when a derivative plaintiff challenges proxy disclosures.

Similarly, none of the other Delaware Chancery Court cases cited by petitioner addressed

the pre-suit demand requirement with regard to proxy-disclosure claims. *Lewis* v. *Leaseway Transportation Corp.*, C.A. No. 8720, 1990 WL 67383, at *1 (Del. Ch. May 16, 1990), was a direct shareholder class action. *In re Mobile Communications Corp. Consolidated Litigation*, C.A. No. 10627, 1989 WL 997182, at *1 (Del. Ch. Apr. 3, 1989), was a shareholder suit seeking to enjoin a corporate reorganization plan. Neither case addressed the issue of pre-suit demand.

In re Tri-Star Pictures, Inc., Litigation, C.A. No. 9477, 1990 WL 82734, at *2, *8-9 (Del. Ch. June 14, 1990), dismissed all the derivative claims for lack of standing and allowed only a direct claim to proceed. Indeed, *Tri-Star* explicitly recognized that "if the disclosure claims were derivative, they would be subject to the demand requirement," *id.* at *8, and an earlier decision in the same litigation contains a detailed analysis of whether director interest would have rendered pre-suit demand futile, *see Siegman* v. *Tri-Star Pictures, Inc.*, C.A. No. 9477, 1989 WL 48746, at *9-12 (Del. Ch. May 5, 1989).

Finally, the Second Circuit's summary order is in accordance with the overwhelming majority of other federal courts that have addressed Delaware's pre-suit demand requirement in the proxy-disclosure context.[5]

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[5] *Compare Risberg ex rel. Aspen Tech., Inc.* v. *McArdle*, 529 F. Supp. 2d 213, 225-26 (D. Mass. 2008); *In re CNET Networks, Inc.*, 483 F Supp. 2d 947, 966 (N.D. Cal. 2007); *In re Computer Scis. Corp. Deriv. Litig.*, No CV 06-05288 MRP, 2007 WL 1321715, at *4 n.4 (C.D. Cal. Mar. 26, 2007); *St. Clair*

B. The Second Circuit Did Not "Nullify" Delaware Law.

This Court does not generally review the lower federal courts' decisions on pure issues of state law, and will not grant *certiorari* to do so except in the most "extraordinary" circumstances. *Leavitt* v. *Jane L.*, 518 U.S. 137, 144-45 (1996) (per curiam); *see also Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983) ("[S]tanding alone, a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review."); *Pierson* v. *Ray*, 386 U.S. 547, 558 n.12 (1967) ("We do not ordinarily review the holding of a court of appeals on a matter of state law . . . .").

Straining to bring his Petition within the rubric of this Court's decision in *Leavitt*, petitioner describes the Second Circuit's ruling that pre-suit demand was required in this case as a "blatant federal-court nullification of state law." (Pet. 5.) This assertion is absurd. As an initial matter, the Second Circuit was not asked to, and did not, strike down a challenged state law and thereby bar the state from enforcing it, as did the lower court in *Leavitt*.

Moreover, far from having "nullified" Delaware law, as discussed above, the Second Circuit applied and enforced a well-established requirement of Delaware law. *See Aronson*, 473 A.2d at 812.

Shores Gen. Employees Ret. Sys. v. *Eibeler*, No. 06 Civ. 688 (SWK), 2006 WL 2849783, at *4-7 (S.D.N.Y. Oct. 4, 2006), *with Vides* v. *Amelio*, 265 F. Supp. 2d 273 (S.D.N.Y. 2003).

Unlike the extraordinary circumstances presented in *Leavitt*—in which the Tenth Circuit ignored an express severability provision when striking down a Utah abortion statute as unconstitutional—petitioner cannot point to any binding Delaware authority that the Second Circuit "nullified." In fact, far from having any kind of "nullifying" effect, the summary order here is not even precedential authority within the Second Circuit. *See* 2d Cir. L.R. 32.1.1(a) ("Rulings by summary order do not have precedential effect.").

Petitioner does not assert that the Second Circuit failed to apply a controlling statute or ruling of the Delaware Supreme Court. Rather, the Petition alleges only that the Second Circuit's decision was "unsupported by any Delaware case" and supposedly is in conflict with a handful of Delaware lower court decisions. (Pet. 6-7.) This is far from rising to the level of the "extraordinary" circumstances that could implicate this Court's *certiorari* jurisdiction. And, as discussed above, it is also wrong: the Delaware cases petitioner cites did not discuss pre-suit demand in the context of a shareholder derivative suit.

Given that the Second Circuit's nonprecedential decision did not "nullify" Delaware law so as to justify *certiorari* under *Leavitt*, 518 U.S. at 144, this Court should follow its well-settled practice and deny the Petition. *See Haring*, 462 U.S. at 314 n.8.

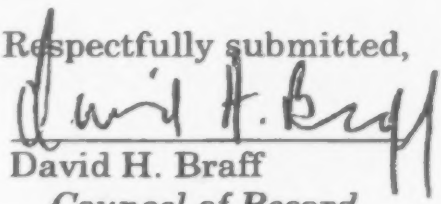
III. Dismissal of This Action Is Warranted on Numerous Other Independent Grounds Not Reached By the Courts Below.

Although not reached by the Second Circuit, the District Court's dismissal of this action may be affirmed on numerous alternate grounds, as argued by Respondents below. Specifically, the complaint failed adequately to plead any viable claim, because the allegedly false and misleading disclosures were stock option valuations, which numerous courts have held are "soft information" that is inherently immaterial as a matter of law. In addition, the complaint fails to satisfy the particularized pleading requirements of Rule 9(b) and the Private Securities Litigation Reform Act of 1995. Each of these grounds, standing alone, would independently support dismissal of this action, underscoring why review would be inappropriate by this Court.

CONCLUSION

For the reasons discussed above, this Court should deny the Petition.

Respectfully submitted,



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